Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term 1979

No. **79-437**

WILLIAM A. MAHONEY,
Petitioner

v.

THOMAS H. WYNN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Court of Appeals has decided an important question which should be authoritatively adjudicated by this Honorable Court—whether or not an accused may be constitutionally required to prove self-defense—and the Court of Appeals in deciding this question has given undue weight to a state's designation of the elements of an offense in violation of the spirit of the applicable law.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, William A. Mahoney prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of *William A. Mahoney v. Thomas H. Wynn*, No. 78-6212, filed June 29, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals styled and filed as above is not yet reported but is printed as Appendix A to this petition (pp 6, *post*), and affirms *Wynn v. Mahoney* #75-0292-HC (EDNC March 14, 1978) unpublished, printed as Appendix B to this petition (pp 12, *post*).

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254 (1) within ninety days of June 29, 1979, the date of entry of the order to be reviewed.

QUESTION PRESENTED

WHETHER A STATE MAY CONSTITUTIONALLY PLACE THE BURDEN OF PROOF WITH REGARD TO SELF-DEFENSE ON AN ACCUSED IN A MURDER TRIAL WHEN STATE LAW DESCRIBES UNLAWFULNESS AS AN ELEMENT OF ITS CRIMINAL HOMICIDES?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

Thomas H. Wynn was tried for murder in the second degree at the July 29, 1974 Session of Superior Court for Robeson County, North Carolina, Honorable Edward B. Clark, Judge Presiding. His evidence raised self-defense. Therefore, in accordance with North Carolina practice at the time, the burden of proof was placed on him to satisfy the jury of this as well as to satisfy them of the lack of malice necessary to reduce any offense from murder to manslaughter.[1] As would be expected, the state had to bear the burden of proof of the offense itself. The applicable instructions are included as Appendix E of this petition (pp 27, *post*). Petitioner bore his burden of negating malice but not of satisfying the jury of self-defense and therefore was convicted of manslaughter. After unsuccessful appeals in state court on grounds other than are involved here, 25 N.C. App. 625 214 S.E.2d 274 (1975), 288 N.C. 252, 217 S.E.2d 677 (1975), petitioner successfully presented to the federal courts the claim that placing the burden of proof on him with regard to self defense violated his rights as established by *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

[1] The historical background and practical effect of this approach is set out in *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575, reversed on other grounds *sub nom. Hankerson v. North Carolina*, 432 U.S. 233, (1977) excerpts from which are reprinted as Appendix D to this Petition (pp 21, *post*).

REASON THE WRIT SHOULD ISSUE

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION WHICH SHOULD BE AUTHORITATIVELY ADJUDICATED BY THIS HONORABLE COURT - WHETHER OR NOT AN ACCUSED MAY BE CONSTITUTIONALLY REQUIRED TO PROVE SELF-DEFENSE - AND THE COURT OF APPEALS IN DECIDING THIS QUESTION HAS GIVEN UNDUE WEIGHT TO THE STATE'S DESIGNATION OF THE ELEMENTS OF AN OFFENSE IN VIOLATION OF THE SPIRIT OF THE APPLICABLE LAW.

The Court of Appeals held that Mr. Wynn's trial was constitutionally bad because he had to bear the burden of proof on self-defense. However, North Carolina law in this regard did not create a fundamentally unfair situation under *Morrison v. California*, 291 U.S. 82, (1934), the thing condemned by the due process clause in the context of a criminal proceeding, *Lisenba v. California*, 314 U.S. 219, (1941). Accordingly, this Honorable Court should grant certiorari to clarify this matter.

The fact underlying the Court of Appeals decision is North Carolina's definition of the various criminal homicides and the interaction of self-defense with one of the elements of those crimes. In North Carolina, unlawfulness is spoken of as an element of the offense of manslaughter, it being defined as (i) the unlawful (ii) killing (iii) of another, *State v. Kea*, 256 N.C. 492, 124 S.E.2d 174 (1962).[2] Therefore, because killings in self-defense are lawful, *State v. Todd*, 264 N.C. 524, 142 S.E.2d 154 (1965), evidence of self-defense on which the burden was placed on Mr. Wynn, necessarily interacted with evidence on the element of the unlawfulness, the burden of proof of which was on the state. The Court of Appeals held that this interaction meant that placing the burden of proof of self-defense on accused in effect shifted the burden of proof on the element of unlawfulness

[2] The proof of a fourth element, malice, makes the homicide murder in the second degree and the proof of fifth and sixth elements, premeditation and deliberation, make the offense first degree murder. *State v. Kea*, supra.

and that this was unconstitutional under current decisions by this Honorable Court. Petitioner here, appellant below, believes that this view is flawed but even if not, the characterization of unlawfulness as an element should not be decisive of the constitutional question involved here.

The reason behind this argument is obvious. To say that unlawfulness is an element of crime is to say nothing for all crimes are unlawful by their very nature. Such matters as self-defense; defense of property; insanity and automatonism; diminished capacity; war and police privilege all determine whether or not a homicide is lawful or unlawful. However, these are the very things the burden of proof of which may be placed on the accused, see e.g. with regard to self-defense, *Frazier v. Weatherholtz*, 472 F.2d 994 (4th Cir. 1978), *State v. Pendry*, 227 S.E.2d 210 (1976), *Williams v. Mohn*, 462 F.Supp. 756 (D.C.W.Va. 1978); and with regard to insanity, *Leland v. Oregon*, 343 U.S. 790 (1952) and *Riveria v. Delaware*, 429 U.S. 877 (1976). Therefore, to say that the characterization of unlawfulness as an element of a crime is decisive on this point is to give state law control over the Constitution. This theme, of course, was specifically and adversely commented upon in coming to the decision in *Mullaney v. Wilbur*, supra 698, albeit from a different perspective. Accordingly, the Court of Appeals has misunderstood the import of Mullaney.

CONCLUSION

Although unlawfulness is described as an element of criminal homicide in North Carolina, this means no more than a homicide committed other than in a privileged manner. Therefore, it is not an element in the same sense as such things as premeditation, deliberation, malice, infliction of a lethal wound, and proximate cause are. In light of this, resolution of Mr.

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[3] The following cases hold that the burden of proof may not be constitutionally placed on an accused with regard to self-defense, *Berrier v. Egeler*, 428 F.Supp. 750 (E.D.Mich. 1976), aff'd 583 F.2d 515 (6th Cir. 1977) cert. den., _____ U.S. _____, _____ L.Ed.2d _____, _____ S. Ct. _____ (1978); *Commonwealth v. Rodriquez*, 370 Mass. 684, 352 N.E.2d 203 (1976), *Maryland v. Evans*, 278 Md. 197, 362 A.2d 629 (1976); *In Re Doe*, _____ R.I. _____, 390 A.2d 920 (1978).

Wynn's case on the basis of this characterization begs the real question presented to the court - the fundamental fairness of the allocation of a particular burden of proof, in this case that of self-defense. Accordingly, certiorari should be granted to clarify the law in this area and assist the courts of this country to a proper resolution of this matter.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

For the Fourth Circuit

No. 78-6212

THOMAS H. WYNN,

Appellee,

v.

WILLIAM A. MAHONEY,
BRUNSWICK CORRECTIONAL UNIT,

Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. John D. Larkins, Jr., Chief Judge.

Argued January 11, 1979 Decided June 29, 1979

Before WINTER and BUTZNER, Circuit Judges, and FIELD, Senior Circuit Judge.

Joan Byers, Assistant Attorney General (Rufus L. Edmisten, Attorney General of North Carolina, Richard N. League, Assistant Attorney General, on brief) for Appellant; Sydenham B. Alexander, Jr. (Alexander and McCormick on brief) for Appellee.

WINTER, Circuit Judge:

The district court sustained the challenge of Thomas H. Wynn to the constitutional validity of the jury instructions under which he was convited of voluntary manslaughter in a North Carolina state court and granted him a writ of habeas corpus. The district court ruled that the jury instructions improperly

placed the burden of proving provocation and self-defense on Wynn, rather than on the state. Although we conclude that the charge to the jury on provocation did not entitle Wynn to habeas corpus relief since the instruction was not prejudicial, we affirm the issuance of the writ because of the infirmity in the charge to the jury on self-defense.

I.

Wynn shot and killed Edmund Hardin, a trailer park manager, shortly after Hardin and Wynn's brother had engaged in an argument at a party in Wynn's trailer. Originally charged with murder in the first degree, Wynn was arraigned and tried for second degree murder and lesser included offenses. After a jury trail in which evidence of both provocation and self-defense was presented, the trial judge gave the following instructions:

> In order to reduce the crime to voluntary manslaughter the defendant must prove, not beyond a reasonable doubt, but simply to your satisfaction that there was no malice on his part and in order to excuse his act altogether on the grounds of self defense, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that he acted in self defense.

On the basis of these and other instructions, the jury found Wynn guilty of voluntary manslaughter. Wynn was sentenced to a term of ten to fifteen years imprisonment.

Following an unsuccessful appeal to the North Carolina Court of Appeals and the denial of certiorari by the North Carolina Supreme Court, Wynn filed this action in the district court. The petition was dismissed initially because Wynn's challenge to the jury instructions had not been raised in state court. The case was reopened, however, when an intervening state court decision, State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975), *rev'd on other grounds sub nom.* Hankerson v. North Carolina, 432 U.S. 233 (1977), indicated that no state remedy was available by ruling that Mullaney v. Wilbur, 421 U.S. 684 (1975), the authority on which Wynn relied, did not apply retroactively.

Although the district court found that Wynn had exhausted his state remedies, it also concluded that *Mullaney* was not

retroactive. Accordingly, it dismissed the case a second time. An appeal to this court resulted in a remand for reconsideration in light, *inter alia*, of Hankerson v. North Carolina, 432 U.S. 233 (1977), which held that *Mullaney* applied retrospectively. *See* Wynn v. Mahoney, No. 76-8334, Dec. 12, 1977 (unpublished). Upon reconsideration, the district court held that the jury instructions were constitutionally infirm for the reasons set forth in a contemporaneous decision, Cole v. Stevenson, 447 F.S. 1268 (E.D. N.C. 1978), *appeal pending*, No. 78-6211 (4 Cir., argued Oct. 2, 1978), and issued a writ of habeas corpus. North Carolina now appeals the grant of the writ.[1]

II.

The district court found the instruction on provocation, as well as that on self-defense, to be constitutionally defective. North Carolina admits that the charge with respect to provocation, like that in *Mullaney, supra*, unlawfully placed the burden of disproving malice on Wynn. But since Wynn convinced the jury to reduce the crime from murder to manslaughter, Wynn appears to have met the burden put upon him. We conclude, therefore, that the error was harmless beyond a reasonable doubt. *See* Chapman v. California, 386 U.S. 18 (1967). In so doing, we find no merit in Wynn's contention that the error in the provocation instruction infected the jury's consideration of the charge on self-defense.

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[1] Although in its answer to the original petition for a writ of habeas corpus North Carolina pleaded non-exhaustion, it made no such claim in its brief in this appeal. At oral argument, we raised the question about exhaustion of state remedies anew and also inquired into possible non-compliance with a state contemporaneous objection rule contrary to Wainwright v. Sykes, 433 U.S. 72 (1977). We are now of the opinion that neither of these doctrines precludes review in this case. While state courts are generally given an opportunity to apply a recent change in constitutional law to prisoner petitions, *see* James v. Copinger, 428 F.2d 235, 242 (4 Cir. 1970), there was no available state remedy at the time the petition was filed and this case has been decided by us once before without our invoking the exhaustion doctrine. Thus, we are persuaded that further exhaustion should not be required. We have no occasion to decide the *Wainwright* question since North Carolina explicitly waived that point in oral argument of this appeal.

III.

Because proof of self-defense constitutes an absolute defense in that it renders the homicide justifiable, any error in the trial court's instruction concerning self-defense was necessarily prejudicial. The Supreme Court has not yet considered the proper allocation of the burden of proof with regard to self-defense. However, a review of the relevant Supreme Court and North Carolina decisions leads us to conclude that the North Carolina jury instruction on self-defense in effect at the time of Wynn's conviction violated the due process clause.[2]

In the seminal case dealing with the allocation of the burden of proof in criminal cases, the Supreme Court held that due process requires the prosecution to prove every element of the offense charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1969). The rationale of *Winship* was subsequently applied in *Mullaney* to invalidate the Maine requirement that a defendant prove provocation in order to reduce a murder charge

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[2] The instruction in question required Wynn to prove self-defense, not beyond a reasonable doubt, but only to the jury's satisfaction. Satisfaction of the jury has been defined by the Supreme Court of North Carolina as

> a standard no greater and at the same time one not significantly less than persuasion by a preponderance of the evidence. Satisfying the jury means that there must be some evidence offered of all elements of heat of passion on sudden provocation or of self-defense, as the case may be, and that this evidence must satisfy or persuade the jury of the truth of the existence of these provocations — one which robs the crime of malice and the other which excuses it altogether.

State v. Hankerson, *supra*, 220 S.E.2d at 587. *Mullaney* expressly condoned the state requirement that a defendant produce "some evidence" of provocation or self-defense before the prosecution is called upon to prove the absence of these defenses beyond a reasonable doubt. 421 U.S. at 701 n.28 and 702 nn. 30 & 31. While North Carolina has placed upon its defendants the burden of proiducing "some evidence" of provocation or self-defense, it has gone on to require that the evidence "must satisfy or persuade the jury of the truth of the existence of these provocations," a standard "not significantly less than persuasion by a preponderance." Accordingly, the Supreme Court of North Carolina determined that its standard, unlike the requirement contemplated in the *Mullaney* footnotes, shifted the burden of persuasion and not simply the burden of production to the defendant. State v. Hankerson, *supra*, 220 S.E.2d at 587.

to manslaughter. 421 U.S. at 704. The scope of *Winship* and *Mullaney* appears, however, to have been limited by Patterson v. New York, 432 U.S. 197 (1977). In *Patterson*, the Supreme Court upheld the New York requirement that a defendant charged with second degree murder show extreme emotional disturbance to lessen the crime to manslaughter. *Patterson* relied on the fact that the New York statute, unlike the Maine statute, did not include malice as an element of murder. Rather, extreme emotional disturbance was defined as an affirmative defense. As a result, no element of the crime was presumed and no burden placed on the defendant to negate an essential element of the crime. *Id.* at 205-06.

In State v. Hankerson, *supra*, the Supreme Court of North Carolina held that the long-standing North Carolina rule placing the burden of proving self-defense on the defendant was unconstitutional under *Mullaney*. *Id.* at 587. The court refused, nonetheless, to apply *Mullaney* retroactively. 220 S.E.2d at 589. The case was later reversed by the Supreme Court of the United States on the ground that *Mullaney* was to be accorded retroactive effect. Hankerson v. North Carolina, 432 U.S. 233, 240 (1977). But that Court declined to consider whether due process required the North Carolina prosecutor to disprove self-defense since the issue was not properly raised by the parties. 432 U.S. at 245. Although two members of the Court suggested that the state supreme court re-examine its holding in light of *Patterson*, *id.* (Burger, C. J., & Blackmun, J., concurring), the state court on remand summarily ordered a new trial in conformity with the Court's opinion on retroactivity. 247 S.E.2d 234 (N.C. 1977).

We think that the ruling of the Supreme Court of North Carolina as to the unconstitutionality of the North Carolina self-defense instruction was correct, and that this result is not affected by *Patterson*. In specifying the instructions to be given in future homicide cases, the North Carolina Supreme Court stated that

> the State must bear the burden throughout the trial of proving *each element of the crime charged including*, where applicable, malice and *unlawfulness* beyond a reasonable doubt.

220 S.E.2d at 589 (emphasis added). Since North Carolina considers unlawfulness—or the absence of self-defense—to be an element of murder, the rationale of *Patterson*, which extends only to affirmative defenses, is inapplicable.[3] We hold, therefore, that the instruction putting the burden of proving self-defense upon Wynn was constitutionally infirm under *Mullaney* and that the issuance of the writ by the district court was correct.[4]

AFFIRMED.

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[3] Any burden that might have existed on Wynn to produce some evidence indicating that he acted in self-defense so as to trigger North Carolina's obligation to prove the unlawfulness of the killing beyond a reasonable doubt was amply met. The evidence showed that Wynn's brother and the deceased had an argument at the party in Wynn's trailer. The deceased left but later returned armed, so Wynn was advised, with a gun. Wynn armed himself and went out of the trailer to meet the deceased. The argument between the deceased and Wynn's brother then resumed and Wynn attempted to quell it. The deceased raised his gun, pointed it at Wynn, said that he would kill Wynn, and fired a number of times. Each shot missed. According to Wynn:

> At the time I shot him, it was obvious from his threats that he was going to kill me in that he had shot at me four times and was still aiming his pistol at me at the point in time that I fired.

[4] Frazier v. Weatherholtz, 572 F.2d 994 (4 Cir. 1978), which upheld Virginia's requirement that a defendant raise a reasonable doubt as to self-defense, is distinguishable. In the first place, the Supreme Court of Virginia had held that the rule shifted only the burden of production, not the burden of persuasion, to the defendant. *See* n.2 *supra*. Secondly, there was no indication that Virginia regarded unlawfulness as an element of murder; rather, the court appeared to view the plea of self-defense in Virginia as an affirmative defense and applied *Patterson* accordingly.

APPENDIX B

In The United States District Court

For The Eastern District of North Carolina
Raleigh Division
NO. 75-0292-HC

THOMAS H. WYNN, PETITIONER	)	MEMORANDUM OPINION
	)	
	)	AND
v.	)	
	)	ORDER
WILLIAM A. MAHONEY, BRUNSWICK CORRECTIONAL INSTITUTE, RESPONDENT	)	

LARKINS, CHIEF JUDGE:

In an unpublished opinion the Court of Appeals for the Fourth Circuit remanded this case for reconsideration in light of *Patterson v. New York*, 45 U.S.L.W. 4708 (U.S. June 17, 1977), *Hankerson v. North Carolina*, 45 U.S.L.W. 4717 (U.S. June 17, 1977) and *Wainwright v. Sykes*, 45 U.S.L.W. 4807 (U.S. June 23, 1977).

In the case at bar the petitioner challenges the constitutional validity of the jury instructions. The petitioner was charged with murder; the jury found him guilty of voluntary manslaughter. The petitioner contends that the trial judge erroneously placed the burden of proof upon him to reduce the charge from murder to manslaughter by proving the absence of malice.

> "In order to reduce the crime to voluntary manslaughter the defendant must prove, not beyond a reasonable doubt, but simply to your satisfaction that there was no malice on his part."[1]

[1] Immediately preceding the Court charged: "Now, if the State proves beyond a reasonable doubt that the defendant intentionally killed Edmund Hardin with a deadly weapon or intentionally inflicted a wound upon him with a deadly weapon that proximately caused his death, then the law raises two presumptions: First, that the killing was unlawful and second, that it was done with malice; thus, nothing else appearing, the defendant would be guilty of second degree murder."

Thereafter the trial judge proceeded to instruct the jury regarding what the defendant must satisfy them of to meet his burden.

In addition the trial judge gave the following instruction as to self-defense which the petitioner contends is unconstitutional.

> "Now, members of the jury, to excuse the killing entirely on the ground of self-defense the defendant must satisfy you of the following four things. (The trial judge then instructed the jury as to these four things.)

The challenged instructions are substantially the same as the instructions held constitutionally infirm in an ORDER entered earlier this week in *COLE v. STEVENSON*. F. SUPP., (E.D.N.C. March 14, 1978).[2] For the reasons stated in that ORDER the Court finds that the petitioner's application for a writ of habeas corpus shall be granted and that the respondents shall discharge him within 90 days unless it wishes to retry the petitioner within this period.

NOW THEREFORE, in accordance with the foregoing, it is

ORDERED that the petitioner's application for a writ of habeas corpus be, and the same is hereby GRANTED; that the respondents shall discharge him within 90 days unless they wish to retry the petitioner within this period; that this case be, and the same is hereby DISMISSED; and that the Clerk shall serve a copy of this ORDER upon the parties of record, the counsel of record, and the United States Magistrate.

LET THIS ORDER BE ENTERED FORTHWITH.

JOHN D. LARKINS, JR.
CHIEF JUDGE

AT TRENTON, NORTH CAROLINA
MARCH 17, 1978

[2] The full caption of this case is as follows: *JAMES LEWIS COLE, PETITIONER v. L. V. STEVENSON, SUPERINTENDENT; and ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, RUFUS L. EDMISTEN, RESPONDENTS*. NO. 77-0351-HC, RALEIGH DIVISION.

APPENDIX C

In The United States District Court

For The Eastern District of North Carolina
Raleigh Division

JAMES LEWIS COLE, Petitioner	)
	) NO. 77-0351-HC
v.	)
L.V. STEVENSON, SUPERINTENDENT; and ATTORNEY GENERAL OF STATE OF NORTH CAROLINA, RUFUS L. EDMISTEN, Respondents	) ORDER

This habeas corpus application was submitted by James Lewis Cole, a state court prisoner who alleges the violation of his Fourteenth Amendment rights. Petitioner entered a not guilty plea to a charge of murder. Upon this plea, he was tried by jury, convicted of second degree murder, and sentenced to imprisonment for a period of from twenty to thirty years. His conviction was upheld by the North Carolina Supreme Court in *State v. Cole*, 280 N.C. 398 (1971) and a 1975 federal habeas corpus application also proved unsuccessful. Mr. Cole later filed a state post-conviction application which was denied without hearing on July 1, 1977. No appeal was taken from this denial.

The instant habeas corpus petition raises two grounds for relief: (1) that the trial judge erroneously placed the burden of proof on petitioner to reduce the charges against him from murder to manslaughter by proving the absence of malice;[1] and (b) the trial court erred in placing the burden on petitioner to prove

[1] Instructions as to malice were given and repeated in the Appellate Transcript at 50, 56, 59 and 61.

self-defense.[2] In light of the trial transcript,[3] both of these issues are clearly raised by the jury instructions and appear constitutionally infirm within the meaning of *Mullaney v. Wilbur*, 421 U.S. 684 (1974) and *Hankerson v. North Carolina*, 432 U.S. 233 (1977).

* * * *

The state's second contention presents the issue of whether or not a defendant can be forced to bear the burden of persuasion for state created affirmative defenses. *Patterson v. New York, supra*, discussed New York statutory law which requires a defendant, charged with second degree murder, to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance to reduce the crime of manslaughter.[21] Unlike *Mullaney*, this procedure does not contravene due process because the affirmative defense does not negate any facts of the crime which the state must prove in order to convict, but constitutes a separate issue. The state's creation of a factor which mitigates the degree of criminality or punishment does not require it to prove beyond a reasonable doubt the defense's nonexistence in each case where it is put into issue, if in the state's judgment this would be too cumbersome, expensive, and inaccurate.[22]

[2] The State, in its brief, contends there was insufficient evidence to support a self-defense charge (only an accidental death defense). This contention is belied by the appellate record. Judge Clark, at 52 of the transcript, charges on self-defense to illustrate the defendant's rights *vis-a-vis* his accidental death defense. The defendant's defense is again referred to at 62, and on page 64, Judge Clark specifically tells the jury that his illustrative instruction was in error and the self-defense instructions should be kept in mind if the evidence upholds such a defense. Therefore, the trial judge clearly found a self-defense charge warranted by the evidence, and petitioner's claim is supported by the trial record.

[3] See footnotes n.1 and n.2, *supra*.

[21] This defense is a legislatively created variant of the heat of passion provocation defense. 432 U.S. at 201-03.

[22] The holdings in *Leland v. Oregon*, 343 U.S. 790, 798 (1952) and *Rivera v. Delaware*, 429 U.S. 877 (1976) are central to the result in *Patterson*. These cases upheld the requirement that a defendant bear the burden of proving the insanity defense against a due process attack. (*Rivera* was dismissed for

The Fourth Circuit's recent opinion in *Frazier v. Weatherholtz*, No. 76-1511 (February 27, 1978), *reversing* 411 F. Supp. 349 (W.D. Va. 1976), requires a thorough examination of the history and effect of North Carolina's self-defense charge. In *Frazier*, the court rather cryptically upheld the challenged self-defense instruction as constitutional under *Patterson, supra, Mullaney, supra*, and *Hodge v. Commonwealth*, 228 S.E. 2d 692 (1976). As delineated by the Virginia Supreme Court in *Hodge* and Judge Turk in his district court *Frazier* opinion, Virginia's jury instructions had long placed the burden of proof on the state to prove each homicide element beyond a reasonable doubt. The reference in these charges to the defendant "bearing

failing to raise a substantial federal question but it read by the court in *Patterson* as reaffirming *Leland*.) The results in these cases were favorably compared to the result in *Patterson*:

> "In convicting Patterson under its murder statute, New York did no more than *Leland* and *Rivera* permitted it to do without violating the Due Process Clause. Under those cases, once the evidence including the evidence of the defendant's mental state, the State may refuse to sustain the affirmative defense of insanity unless demonstrated by a preponderance of the evidence.
>
> "The New York law on extreme emotional disturbance follows this pattern. The affirmative defense, which the Court of Appeals described as permitting 'the defendant to show that his actions were caused by a mental infirmity not rising to the level of insanity, and that he is less culpable for having committed them,' does not serve to negative any facts of the crime which the State is to prove in order to convict for murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion; and unless we are to overturn *Leland* and *Rivera*, New York has not violated the Due Process Clause, and Patterson's conviction must be sustained." 432 U.S. at 206-07.

Patterson also specifically discredited the notion that *Mullaney* read the Due Process Clause as requiring a state to prove beyond a reasonable doubt *any* fact affecting the degree of criminal culpability. The court noted, at 2328-29n.15, that such a rule would deprive legislatures of any discretion in allocating burdens of proof, the practical result of which would be to undermine judicial reform of the criminal justice system. Yet this dicta should not be taken as an invitation for legislatures to reallocate the burden of proving the traditional elements of criminal offenses to the accused, and thus emasculate the *Mullaney* standard. 432 U.S. at 210.

the burden of showing self-defense" is merely that he produce "some" evidence of the existence of self-defense so as to shift the burden to the state and require it to prove beyond a reasonable doubt those elements of homicide which would overcome the defendant's self-defense evidence.[23] Rather than raising a presumption against the accused condemnable under *Mullaney*, Virginia merely creates an *inference* which shifts the burden of going forward from the state to the defendant, but the state continues to bear the ultimate burden of proof beyond a reasonable doubt as to each element of the charged offense. This procedure meets the requirements of *Mullaney*, and as Judge Field for the Circuit Court held,[24] falls within the limits of *Patterson*, presumably because the state did . . . "not shift the burden of proof to the defendant by presuming an ingredient [of the offense] upon proof of the other elements of the offense." 432 U.S. at 215.

The history and effect of North Carolina's self-defense charge is different from those charges the Supreme Court was attempting to insulate in *Patterson*, and the Fourth Circuit sanctioned in *Frazier*. The charge's distinct procedural operation, as delineated in *State v. Hankerson, supra*, is worth quoting at length:

> ". . . The foregoing authorities establish that from 1864 to 1975, 111 years, the law of this State has been this: when it is established by a defendant's judicial admission, or the State proves beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately caused death, the law raises two presumptions against

[23] This procedure, whereby the defendant must show some proof of the defense in order to force the state to negate its existence, was sanctioned in *Mullaney*. *See* discussion *supra* at 2.

[24] Judge Field's conclusion in *Frazier* "that the trial court's instruction on self-defense . . . was well within the limits of *Patterson*," must mean that, taken in context to the overall charge, the self-defense portion did not unconstitutionally shift the burden of proof to Frazier. Judge Turk had concluded that, although the usual Virginia jury instructions were not infirm under *Mullaney*, *this particular* charge improperly shifted the burden.

the defendant: (1) the killing was unlawful, and (2) it was done with malice. Nothing else appearing in the case the defendant would be guilty of murder in the second degree. When these presumptions arise the burden devolves upon the defendant to prove to the satisfaction of the jury the legal provocation which will rob the crime of malice and reduce it to manslaughter or which will excuse the killing altogether on the ground of self-defense. If defendant rebuts the presumption of malice only, the presumption that the killing was unlawful remains, making the crime manslaughter. The jury instructions complained of here were in accordance with these long established rules. . . .

"Satisfying the jury, the standard long adopted by this Court and utilized in the instructions now under consideration means, we believe, a standard no greater and at the same time one not significantly less than persuasion by a preponderance of the evidence. Satisfying the jury means that there must be some evidence offered of all elements of heat of passion on sudden provocation or of self-defense, as the case may be, and that this evidence must satisfy or persuade the jury of the truth of the existence of these provocations — one which robs the crime of malice and the other which excuses it altogether.

"Under the Maine rules considered in *Mullaney* when the State proved beyond a reasonable doubt that the killing was (1) intentional, and (2) unlawful, the jury was told that the defendant would be guilty of murder unless he proved by a preponderance of the evidence that he killed in the heat of passion in which case he could be convicted only of manslaughter. *Under North Carolina rules when the State proved beyond a reasonable doubt a killing proximately resulting from the intentional use of a deadly weapon the jury here was told, in effect, that defendant would be guilty of murder in the second degree unless he "satisfies" the jury that he killed in the heat of sudden passion or in self-defense. The instructions here under consideration, therefore, like those in Maine, unconstitutionally relieved the prosecution of the burden of proving beyond a reasonable doubt malice and unlawfulness when the issues of their existence were properly raised.*" 288 N.C. at 647-48. (emphasis added).

Although the Chief Justice and Justice Blackman in *Hankerson, supra*, at 245, suggested that North Carolina rereview its self-defense instructions in light of *Patterson*, no such rereview has been forthcoming. Therefore, we can only assume that the State Supreme Court's interpretation of the instruction's operation in *State v. Hankerson, supra*, is controlling.

As the language quoted above establishes, North Carolina allows the presumption of "malice" and "unlawfulness" to be raised when the state proves a wound was "intentionally inflicted upon the victim which proximately caused death." By employing the presumption of unlawfulness, the state does far more than "create an inference that procedurally shifts the burden of going forward with the proof" as does Virginia; instead, the accused must prove by a "preponderance" that he acted in self-defense. The state, therefore, does not bear the burden to first prove unlawfulness but can merely rest upon the presumption. Also, the North Carolina self-defense charge allows the presumption of one ingredient of an offense when another is shown. This is a far cry from the New York law discussed in *Patterson* which requires the state to prove *each* element of the murder charge without presuming or inferring any facts, and only when each of these is proven does the defendant bear the burden of proving an affirmative defense. In light of the foregoing, North Carolina's pre-*Hankerson* self-defense instruction does not fit within the limits established by *Patterson* and applied in *Frazier*.

This court is well aware of the impact its decision may have on the administration of justice in North Carolina. Such factors were considered by the United States Supreme Court in its *Hankerson* decision but were rejected in favor of preserving and enhancing a criminal trial's truth-finding function. The procedures through which a state can insulate past convictions were specifically delineated in *Mullaney* and *Hankerson*. Yet

these procedural rules should not and will not be enforced in circumvention of the Supreme Court's clear language and intent, thereby depriving criminal defendants of their due process rights.

In light of the foregoing legal findings and conclusions, I order petitioner's application for a writ of habeas corpus to be granted and the state to discharge him within ninety days unless it wishes to retry petitioner within this period.

LET THIS ORDER BE ENTERED FORTHWITH.

JOHN D. LARKINS, JR.
CHIEF JUDGE

AT TRENTON, NORTH CAROLINA
March 14
_____, 1978

APPENDIX D

STATE OF NORTH CAROLINA
v.
JOHNNIE B. HANKERSON
No. 56
(Filed 17 December 1975)

* * * * *

IV

On June 9, 1975, the United States Supreme Court decided *Mullaney v. Wilbur*, 421 U.S. 684, which held that a Maine jury instruction requiring a defendant being tried for murder to prove by a preponderance of the evidence, in order to reduce the murder to manslaughter, that he acted in the heat of passion on sudden provocation, violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as that clause was interpreted in *In re Winship*, 397 U.S. 358 (1970) to require the prosecution to prove beyond a reasonable doubt every fact necessary to constitute a crime. It was subsequently re-explained in *Faretta v. California*, 422 U.S. 806, n. 15 (1975) that the right of the defendant to have this burden placed on the State, though not literally expressed in any particular provision of the Constitution, was essential to due process of law in a fair adversary process.

Defendant contends that under the rationale of *Mullaney* the trial judge's instructions to the jury in this case violate Fourteenth Amendment Due Process. While the trial judge in defining second degree murder and manslaughter and in his final mandate to the jury placed upon the State the burden to prove beyond a reasonable doubt both malice and unlawfulness, i.e., without justification or excuse, he also instructed the jury, in pertinent part, as follows:

> *"If the State proves beyond a reasonable doubt or it is admitted that the defendant intentionally killed Gregory Ashe with a deadly weapon, or intentionally inflicted a wound upon Gregory Ashe with a deadly weapon, that proximately caused his death, the law raises two*

presumptions; first, that the killing was unlawful, and second, that it was done with malice. Then, nothing else appearing, the defendant would be guilty of second degree murder. . . .

"As I told you, you will have to either find the defendant guilty of second degree murder or manslaughter or not guilty. *In order to reduce the crime from second degree murder to manslaughter, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that there was no malice on his part. And in order to excuse his act altogether on the grounds of self-defense, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that he acted in self-defense.* And I will charge you on self-defense in just a moment. But I do want to charge you that *to negate malice and thereby reduce the crime to manslaughter, the defendant must satisfy you of three things:* first, that he shot Gregory Ashe in the heat of a passion. . . . The second thing he must satisfy you of is that this passion was provoked by acts of Gregory Ashe which the law regards as adequate provocation. . . . And thirdly, that the shooting took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.

"*To excuse the killing entirely on the grounds of self-defense . . . the defendant must satisfy you of four things:* first, that it appeared to the defendant and he believed it to be necessary to shoot Gregory Ashe in order to save himself from death or great bodily harm. . . . The second thing that you must be satisfied of—excuse me—that the defendant must satisfy you of is this, that the circumstances as they appeared to him at the time were sufficient to create such belief in the mind of a person of ordinary firmness. . . . And the third thing the defendant must satisfy you of is that he was not the aggressor. . . . And the fourth thing that the defendant must satisfy you of is that he did not use excessive force. . . .

"If you find that the defendant acted properly in self-defense, he would not be guilty. However, if the defendant though otherwise acting in self-defense used excessive force, the defendant would be guilty of voluntary manslaughter." (Emphases supplied.)

We hold that by reason of the decision in *Mullaney* the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense. The instructions given here insofar as they placed these burdens of proof on the defendant violate the concept of due process announced for the first time in *Mullaney*. We decline, however, for reasons hereinafter stated, to give *Mullaney* retroactive effect in North Carolina. We hold that because the trial judge instructed the jury in accordance with our law of homicide as it stood, and in a trial conducted, before the *Mullaney* decision, the defendant is not entitled to the benefit of the *Mullaney* doctrine. We will, however, apply the decision to all trials conducted on or after June 9, 1975.

* * * *

The foregoing authorities establish that from 1864 to 1975, 111 years, the law of this State has been this: when it is established by a defendant's judicial admission, or the State proves beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately caused death, the law raises two presumptions against the defendant: (1) the killing was unlawful, and (2) it was done with malice. Nothing else appearing in the case the defendant would be guilty of murder in the second degree. When these presumptions arise the burden devolves upon the defendant to prove to the satisfaction of the jury the legal provocation which will rob the crime of malice and reduce it to manslaughter or which will excuse the killing altogether on the ground of self-defense. If defendant rebuts the presumption of malice only, the presumption that the killing was unlawful remains, making the crime manslaughter. The jury instructions complained of here were in accordance with these long established rules.

This Court has never defined precisely what is meant by "satisfying" the jury. It has been clear, however, from the earliest cases that satisfying the jury meant something other

than persuading beyond a reasonable doubt and persuading by a preponderance of the evidence. *State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969); *State v. Barrett*, 132 N.C. 1005, 43 S.E. 832 (1903). This Court said in *Barrett:*

> "[T]he prisoner must satisfy the jury, neither by a reasonable doubt nor yet by a preponderance of the evidence, but simply satisfy them, of the existence of facts and circumstances which mitigate the offense or which make good a plea of self-defense."

Satisfying the jury, the standard long adopted by this Court and utilized in the instructions now under consideration means, we believe, a standard no greater and at the same time one not significantly less than persuasion by a preponderance of the evidence. Satisfying the jury means that there must be some evidence offered of all elements of heat of passion on sudden provocation or of self-defense, as the case may be, and that this evidence must satisfy or persuade the jury of the truth of the existence of these provocations—one which robs the crime of malice and the other which excuses it altogether.

Under the Maine rules considered in *Mullaney* when the State proved beyond a reasonable doubt that the killing was (1) intentional, and (2) unlawful, the jury was told that the defendant would be guilty of murder unless he proved by a preponderance of the evidence that he killed in the heat of passion in which case he could be convicted only of manslaughter. Under North Carolina rules when the State proved beyond a reasonable doubt a killing proximately resulting from the intentional use of a deadly weapon the jury here was told, in effect, that defendant would be guilty of murder in the second degree unless he "satisfies" the jury that he killed in the heat of sudden passion or in self-defense. The instructions here under consideration, therefore, like those in Maine, unconstitutionally relieved the prosecution of the burden of proving beyond a reasonable doubt malice and unlawfulness when the issues of their existence were properly raised.

We note that there is no evidence in this case of a killing in the heat of passion on sudden provocation. Therefore this issue is not "properly presented" as it was in *Mullaney*. There could

not, consequently, be any *Mullaney* error prejudicial to defendant on this aspect of the case.

As a matter of state law, however, and as the jury was instructed here, our rules allocating burden of proof on self-defense and heat of passion are the same. As early as 1868 this Court in *State v. Willis, supra* at 29-30 said, "In the proof of such matters we do not recognize any distinction between the case where the question is whether the homicide is murder or manslaughter, and that where it is whether the killing is murder or excusable or justifiable homicide." There is in this case evidence of self-defense. The issue regarding its existence is properly presented. For the guidance of our trial judges, consequently, and inasmuch as there are jury instructions given here as if there were evidence of heat of passion killing, we have discussed the matter as if such evidence were indeed present.

* * * *

Mullaney, then, as we have interpreted it, requires our trial judges in homicide cases to follow these principles in their jury instructions: the State must bear the burden throughout the trial of proving each element of the crime charged including, where applicable, malice and unlawfulness beyond a reasonable doubt. The decision permits the state to rely on mandatory presumptions of malice and unlawfulness upon proof beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately resulted in death. If, after the mandatory presumptions are raised, there is no evidence of a heat of passion killing on sudden provocation and no evidence that the killing was in self-defense, *Mullaney* permits and our law requires the jury to be instructed that defendant must be convicted of murder in the second degree. If, on the other hand, there is evidence in the case of all the elements of heat of passion on sudden provocation the mandatory presumption of malice disappears but the logical inferences from the facts proved remain in the case to be weighed against this evidence. If upon considering all the evidence, including the inferences and the evidence of heat of passion, the jury is left with a reasonable doubt as to the existence of malice it must find the defendant not guilty of murder

in the second degree and should then consider whether he is guilty of manslaughter. If there is evidence in the case of all the elements of self-defense, the mandatory presumption of unlawfulness disappears but the logical inferences from the facts proved may be weighed against this evidence. If upon considering all the evidence, including the inferences and evidence of self-defense, the jury is left with a reasonable doubt as to the existence of unlawfulness it must find the defendant not guilty.

APPENDIX E

"In this case, Members of the Jury, the State announced when the case was called for trial that it was seeking a verdict of second degree murder, in which the defendant, Thomas Wynn, is charged with the murder of Edmund Hardin on or about the 26th day of October, last. To this charge, the charge of second degree murder, the defendant has entered a plea of not guilty and this plea of not guilty raises in his behalf a presumption of innocence, which places the burden on the State of satisfying you, the jury, of the defendant's guilt beyond a reasonable doubt. The charge in the indictment against this defendant is in itself no evidence against him. The burden is on the State and remains on the State throughout the trial to satisfy you from the evidence and beyond a reasonable doubt that the defendant is guilty."

* * * *

"If, after weighing and considering all of the evidence, you are fully satisfied and entirely convinced of the defendant's guilt, then you would have — then you would be satisfied beyond a reasonable doubt. On the other hand, if you do have a doubt based on reason and common sense, arising from the evidence or from the lack of the evidence, as to any fact or any element necessary to constitute guilt, then you would have a reasonable doubt and it would be your duty to give the benefit of such doubt to the defendant.

Second degree murder, Members of the Jury, is an unlawful killing of a human being with malice. I instruct you that in this case, the law and the evidence, you may return one of three verdicts: You may find the defendant guilty of voluntary manslaughter or you may find the defendant not guilty.

Now, for you to find the defendant guilty of second degree murder, the State must prove two things beyond a reasonable doubt: First, that the defendant intentionally and without justification or excuse and with malice, did shoot Edmund Hardin with a deadly weapon. Now, malice is not only hatred, ill will or spite — as it is ordinarily understood, which, of course, is malice — but it also means that condition of mind which prompts a person

to take the life of another intentionally, or to intentionally inflict the wound with a deadly weapon upon another which proximately results in his death, without justification, excuse or just cause. Now, I do instruct you, Members of the Jury, that a .38 caliber pistol, revolver, is a deadly weapon, as a matter of law. The State must prove and must satisfy you from the evidence, beyond a reasonable doubt, that the shooting was a proximate cause of Edmund Hardin's death. Proximate cause is a real cause. A cause without which Edmund Hardin's death would not have occurred.

Now, if the State proves beyond a reasonable doubt that the defendant intentionally killed Edmund Hardin with a deadly weapon or intentionally inflicted a wound upon him with a deadly weapon that proximately caused his death, then the law raises two presumptions: First, that the killing was unlawful and second, that it was done with malice; thus, nothing else appearing, the defendant would be guilty of second degree murder."

* * * *

"Now, members of the jury, to excuse the killing entirely on the ground of self defense the defendant must satisfy you not beyond a reasonable doubt, but simply satisfy you of the following four things:

First, that it appeared to the defendant, and he believed it to be necessary to shoot Edmund Hardin in order to save himself from death or great bodily harm. Second, that the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness — and it is for you, the Jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time. In making this determination you should consider the circumstances as you find them to have existed from the evidence, including the size and strength of the defendant as compared to Edmund Hardin, and the fierceness of the assault, if any, upon the defendant; whether or not Edmund Hardin had a weapon in his possession, and other facts and circumstances.

Third, that the defendant was not the aggressor. Now, if the defendant voluntarily and without provocation entered the

fight, he was the aggressor. One enters a fight voluntarily if he uses, toward his opponent, using language which, considering all of the circumstances, is calculated and intended to bring on a fight. And fourth and last, that the defendant did not use excessive force. That is, more force than reasonably necessary to the defendant at the time — and again, it is for you, the Jury, to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to him at the time. And if you find, Members of the Jury, that the defendant acted properly in self defense, he would not be guilty. However, if the defendant, though otherwise acting in self defense, used excessive force, though he had no murderous intent when he entered the fight the defendant would be guilty of voluntary manslaughter."

* * * *

"Now, finally, Members of the Jury, I instruct you that if you find from the evidence and beyond a reasonable doubt that on or about the twenty — let's see. You have the indictment over there? Is that file over there?

MR. L. BRITT: No, sir, I do not. I believe the Clerk has it.

THE COURT: That on or about the 27th day of October, 1973, the defendant, Thomas Wynn, intentionally and with malice and without justification or excuse did shoot Edmund Hardin with a deadly weapon, to wit, a .38 caliber revolver, thereby proximately causing Hardin's death, nothing else appearing, it would be your duty to return a verdict of guilty of second degree murder.

However, if you do not so find or have a reasonable doubt as to one or more of these things, then you would not return a verdict of guilty of second degree murder, and if you do not find the defendant guilty of second degree murder, you must consider whether he is guilty of voluntary manslaughter, and as to this: If you find from the evidence and beyond a reasonable doubt that on or about the 27th of October, last, the defendant, Thomas Wynn, did shoot Edmund Hardin with a deadly weapon, a .38 caliber revolver, thereby proximately causing Hardin's death, but you are satisfied that the defendant killed without malice, in the heat of sudden passion, nothing else appearing, that he used

excessive force in exercising his right of self defense, then it would be your duty to return a verdict of guilty of voluntary manslaughter. However, if you do not so find or have a reasonable doubt as to one or more of these things, then you would return a verdict of not guilty. And if you are, however, satisfied that under the circumstances as they existed at the time of the killing the Defendant, Thomas Wynn, reasonably believed it to be necessary to shoot Edmund Hardin in order to save himself of death or great bodily harm and that he, the defendant, was not the aggressor and did not use excessive force, it would be your duty to return a verdict of not guilty."